THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

NO. 02-C-318

STEVEN COUTURE AND LYNN COUTURE

V.

G.W.M., INC. d/b/a AUTO-TORIUM;
WFS FINANCIAL, INC.; AND
JOHN DOES 1-10

OPINION AND ORDER

LYNN, J.

The plaintiffs, Steven and Lynn Couture, instituted this proposed class action to obtain redress for alleged deceptive practices engaged in by the defendants in connection with the financing of used cars purchased by the plaintiffs and members of the class. The defendants are G.W.M., Inc. doing business as the Auto-Torium, a New Hampshire automobile dealer licensed under the provisions of RSA chapter 361-A (1995 and Supp. 2002); WFS Financial, Inc., a California corporation engaged in the business of providing subprime car loans to individuals with poor credit histories and which purchased the Coutures' retail installment sales contract from Auto-Torium.; and ten additional, as-yet-unidentified, auto finance companies (referred to in the complaint as "John Does 1-10") which also purchased installment sales contracts from Auto-Torium. The amended complaint asserts claims against Auto-Torium for violation of RSA 361-A, the Retail Installment Sales of Motor Vehicles Act, and RSA 358-A (1995 and Supp. 2002), the Consumer Protection Act (CPA), and for breach of contract; and also seeks to hold WFS liable as an assignee pursuant to the terms of the contract and under the

Federal Trade Commission's (FTC) "Holder Rule," 16 C.F.R. § 433, (count V). The matter comes before the court at this time on motions to dismiss filed by Auto-Torium and WFS. I conclude that the CPA claim must be dismissed, but that in all other respects the motions must be denied.

I.

Accepting as true all allegations contained in the amended complaint and drawing all inferences therefrom in the light most favorable to plaintiffs, see Jay Edward, Inc. v. Baker, 130 N.H. 41, 45 (1987), the pertinent facts are as follows. On July 19, 2001, plaintiffs purchased a 1998 Ford Explorer from the Auto-Torium's Hooksett, New Hampshire sales facility. To finance the purchase, plaintiffs entered into a retail installment contract with Auto-Torium. This contract (hereinafter "the first contract") contained a finance rate of 14.25% and a finance charge of $6,632.00. At the same time they executed the retail installment contract, Auto-Torium also required plaintiffs to execute a document entitled "Notice of Pre-Approval." This document, including its various grammatical and/or typographical errors, is set forth in its entirety below:

NOTICE OF PRE-APPROVAL

THIS RIDER IS ATTACHED TO AND MADE PART OF A MOTOR VEHICLE RETAIL SALES FINANCE CONTRACT

DATE _____
BUYER'S NAME _____
VIN# _____
YEAR, MAKE, MODEL _____

IF GWM INC., DBA AUTO TORIUM IS UNABLE TO SECURE A BANK LOAN, WITHIN TWO (2) BANKING DAYS OF THIS DATE FOR SAID BUYER BECAUSE OF FALSE STATEMENTS: DELINQUENT CREDIT, INSUFFICIENT DOWN PAYMENT, THE LACK OF PROOF OF INCOME AND/OR ANY OTHER REASON LEADING TO A FINANCE TURNDOWN,

THE BUYER SHALL, WITHIN 24 HOURS, RETURN SAID VEHICLE TO AUTO-TORIUM.

IF THE BUYER DOES NOT RETURN SAID VEHICLE, AUTO-TORIUM MAY TAKE THE VEHICLE FROM ME, (REPOSSESSION) WITH OR WITHOUT COURT ORDER, TO TAKE THE VEHICLE, YOU CAN ENTER MY LAND AND/OR ANY GARAGE OR BUILDING WHERE THE VEHICLE IS LOCATED SO LONG AS IT IS DONE PEACEFULLY, AUTO-TORIUM AT THAT TIME, WILL RETURN BUYERS DEPOSIT LESS ANY MONEY RESULTING FROM REPAIR OF DAMAGE OCCURING TO SAID VEHICLE DURING THE BUYERS POSSESSION, AND THIS CONTRACT SHALL BE NULL AND VOID.

IT MAY BE NECESSARY FOR AUTO-TORIUM TO SECURE A BANK LOAN FOR YOU AT AN ALTERNATE SOURCE OTHER THAN THE LENDER ORIGINALLY INTENDED AT THE TIME YOU TOOK DELIVERY IT IS POSSIBLE, BUT NOT LIMITED TO THAT THE TERMS, INTEREST RATE, OR REQUIRED DOWN PAYMENT COULD CHANGE IF NECESSARY, YOU AGREE TO RETURN TO AUTO-TORIUM (WITHIN TWENTY-FOUR HOURS OF BEING NOTIFIED) AND EXECUTE ANY AND ALL DOCUMENTS REQUIRED BY THE LENDER THAT DID APPROVE YOUR LOAN.

BUYER'S SIGNATURE _____

CO-BUYER'S SIGNATURE _____

After plaintiffs executed the above documents, Auto-Torium took possession of the car plaintiffs were trading-in, signed over the title papers to the Explorer, affixed temporary plates to the vehicle, issued a temporary registration, and gave the keys to the plaintiffs, who then drove the Explorer home.

One week later, on July 26, 2001, Auto-Torium telephoned plaintiffs and told them that they would need to re-write the installment sales contract because Auto-Torium had been unable to obtain financing under the terms contained therein. On July 28, 2001, plaintiffs signed a new contract with Auto-Torium (hereinafter "the second contract"), which was backdated to July 19, 2001, and which contained a higher

financing rate (17.99%) and finance charge ($8,230) than the first contract. Auto-Torium assigned the second contract to WFS. The assignment to WFS was made subject to all claims and defenses which plaintiffs could have asserted against Auto-Torium. Plaintiffs have made monthly installment payments to WFS based upon the higher interest rate specified in the second contract.

Plaintiffs allege that the scenario described above with respect to their own purchase of the Explorer is typical of the manner in which Auto-Torium does business. They further allege that this practice amounts to a form of "bait and switch" scheme, under which a customer is lulled into purchasing a vehicle under an initial, lower interest rate, and only later -- after the customer has surrendered his previous vehicle (the trade-in) and has been allowed to take possession (and hence to become emotionally attached to) the new vehicle – is the customer informed of the true, higher interest rate that he will actually be required to pay. Plaintiffs assert that RSA 361-A was designed to prevent exactly the kind of practices engaged in by Auto-Torium. In addition, plaintiffs claim that such practices violate the CPA and also constitute a breach of contract. Under the terms of the assignment and pursuant to the FTC Holder Rule, plaintiffs contend that WFS also may be held liable for Auto-Torium's breach of contract.

II.

RSA 361-A-7 requires that a retail installment contract for a motor vehicle be in writing, RSA 361-A:7, I(a), and that it contain, inter alia, "[t]he amount of the finance charge," RSA 361-A:7, II(h). With certain exceptions not applicable here, the statute also

provides that "[n]o retail installment contract shall be signed by any party thereto when it contains blank spaces to be filled in after it has been signed . . ." RSA 361-A:7, VI. And RSA 361-A:12 states that "[a]ny waiver of the provisions of this chapter shall be unenforceable and void." Count I of the amended complaint alleges that Auto-Torium violated both the letter and the spirit of these statutory requirements by using the "Notice of Pre-Approval Form" as a means for having plaintiffs enter into a retail installment contract that was not complete as to the finance charge that would apply to the transaction.

Auto-Torium moves to dismiss count I on the grounds that violation of RSA 361-A does not give rise to a private cause of action for damages. Specifically, Auto-Torium argues that under the RSA 361-A statutory scheme, plaintiffs' exclusive remedy is to file a complaint with the New Hampshire Bank Commissioner. It cannot be disputed that chapter 361-A contains no explicit provision creating a private cause of action. That being the case, the question then becomes whether legislative intent to allow a private right of action may fairly be inferred from the terms of the statue. See Cross v. Brown, ___ N.H. ___, No. 02-136 (Oct. 29, 2002); Marquay v Eno, 139 N.H. 708, 714-15 (1995). Several provisions of the statute persuade me that the legislature did intend to allow private individuals in the position of plaintiffs to sue for harm allegedly resulting from the type of statutory violations alleged here.

First, although Auto-Torium suggests that plaintiffs' proper remedy under the statute is to file a complaint with the bank commissioner pursuant to RSA 361-A:4 or :4-a, it is not at all clear under the statute that the bank commissioner has the power to

grant the type of relief which the plaintiffs seek – a refund of all interest charges paid in connection with the allegedly invalid contract. RSA 361-A:6-a authorizes the bank commissioner to examine the affairs of both licensees and non-licensed persons to determine compliance with the provisions of chapter 361-A, and RSA 361-A:5 grants the commissioner subpoena power to carry out these responsibilities. However, the only explicit remedial power granted to the commissioner under the statute is that found in RSA 361-A:3, which allows the commissioner to suspend or revoke the license of a sales finance company or retail seller who (a) makes a material misstatement in its application for a license, (b) willfully fails to comply with any provision of chapter 361-A, or (c) makes fraudulent misrepresentations or otherwise engages in conduct designed to circumvent or conceal from a retail buyer any material information required to be furnished to the buyer under the statute. No where in the statute is the bank commissioner given authority to order a licensee to refund finance charges collected as a result of a violation of the statute.

Second, the section of the statute which requires the licensing of sales finance companies and retail sellers contains language which specifically indicates that the legislature contemplated that individuals harmed by a violation of RSA 361-A would be able to seek redress from the courts. Under RSA 361-A:2, II-a, one of the prerequisites for a sales finance company to obtain a license is that it file with the bank commissioner "a $25,000.00 surety bond to the state for the use of the state and any person who may have a cause of action against the principal in the bond under the provisions of this chapter." This section goes on to state that "[r]ecovery against the bond may be made .

. . . by any such person who may have obtained a final judgment in a court of competent jurisdiction naming said principal." Based on this language, there can be no doubt that the legislature assumed a person injured by a violation of chapter 361-A would have "a cause of action" against the offending party.

Third, there is RSA 361-A:11, III, which states, in pertinent part:

> Any person violating the provisions of RSA 361-A:7 or RSA 361-A:8 . . . shall be barred from recovering any finance charge, delinquency, or collection charge on the contract.

Although Auto-Torium argues the above section should be read as merely creating an affirmative defense for an aggrieved buyer who is pursued through the courts by a seller or lender that has violated the statute, there is no support in the text of the section for giving it such a limiting construction. To construe the statute in this fashion would effectively reward a seller or finance company which violated the statute by allowing it to keep any ill-gotten gains it received before the buyer discovered the violation. Furthermore, construing the statute in this fashion could lead to untoward consequences. It might have the effect, for example, of encouraging a buyer who believed he was the victim of a violation of the statute to simply stop making some or all of his loan interest payments, since this would be the only way to force the lender to either acknowledge the violation or take legal action against the buyer, who only then could take advantage of his "affirmative defense." A buyer resorting to this sort of extra-legal "self help" would be placed in a precarious position indeed, since he could not be sure at the outset that his claim would ultimately be found meritorious, and in the interim he would run the risk of ruining his credit rating by virtue of the fact that he

stopped making the interest payments. There is no logical reason why the legislature would have seen fit to encourage such behavior -- or to reward buyers who engage in the same -- by granting them a so-called affirmative defense, while at the same time denying a remedy to buyers, such as plaintiffs here, who responsibly seek a judicial determination of invalidity before they cease making interest payments on their loans.

In sum , I conclude that buyers who claim to have suffered financial harm as a result of a violation of RSA 361-A may pursue an affirmative claim to recover as damages against the party or parties responsible for the violation all finance charges paid in connection with the transaction.

III.

In count II of the complaint, plaintiffs allege that Auto-Torium's utilization of the "Notice of Pre-Approval" form as a means to increase the interest rate and finance charge on their transaction constituted an unfair and deceptive trade practice actionable under the CPA, RSA 358-A. Auto-Torium moves to dismiss count II based on the exemption contained in RSA 358-A:3, I. At the time plaintiffs purchased their vehicle from Auto-Torium, RSA 358-A:3, I exempted from the CPA "trade or commerce otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of this state or of the United States."[1] Auto-Torium

[1] Effective July 17, 2002, this section of the CPA was amended, so that it now exempts:

> Trade or commerce that is subject to the jurisdiction of the bank commissioner, the director of securities regulation, the insurance commissioner, the public utilities commission, the financial institutions and insurance regulators of other states, or federal banking or securities

argues that it falls within this exemption because its business of selling used vehicles pursuant to retail installment sales contracts is subject to regulation by the bank commissioner under RSA 361-A.

In Averill v. Cox, 145 N.H. 328 (2000), the New Hampshire Supreme Court held that, although a regulatory scheme need not provide for a damages remedy in order to exempt trade or commerce regulated thereunder from the reach of the CPA, the regulatory scheme must at least satisfy the following two criteria: (1) it must be comprehensive; and (2) it must protect consumers from the same types of deception, fraud and unfair trade practices as does the CPA. Id. at 332-33. See also Bell v. Liberty Mut. Ins. Co., 146 N.H. 190, 193-94 (2001). Although plaintiffs devote considerable effort to attempting to establish that RSA 361-A does not satisfy the foregoing criteria, the main thrust of their argument seems to be that the statute lacks sufficient regulatory "teeth" to provide an effective remedy for consumers. Whatever force this argument might have had if RSA chapter 361-A were construed so as not to afford a private right of action to persons harmed by a violation of that statute, my conclusion that there is an implied cause of action for violation of chapter 361-A effectively eviscerates plaintiffs' thesis. By affording installment motor vehicle purchasers the explicit full-disclosure and other protections specified in the statute, arming the bank commissioner with the authority to investigate violations and to sanction with license suspension or revocation retail sellers or sales finance companies

(..continued)

> regulators who possess the authority to regulate unfair or deceptive trade practices.

Auto-Torium does not argue that the 2002 version of the statute applies to this case.

which violate the statute, and allowing aggrieved buyers to sue for damages resulting from such violations, the legislature has established a regulatory scheme for this area of trade or commerce that is every bit as comprehensive and effective as that which governs the legal profession (at issue in Averill) and the insurance industry (at issue in Bell). I therefore hold that the conduct of Auto-Torium at issue in this case falls within the RSA 358-A:3, I exemption, thus precluding plaintiffs from pursuing a claim against it under the CPA.[2]

IV.

Count III of the amended complaint alleges that Auto-Torium breached the terms of the first contract by depriving plaintiffs of the benefits of that contract when, through use of the Notice of Pre-Approval form, it forced them to agree to the terms of the second contract. Plaintiffs' theory is that those terms of the first contract (as incorporated by the pre-approval form) which required them to commit to a future contractual obligation with an unspecified interest rate and finance charge were

[2] Plaintiffs also suggest that Auto-Torium's bait and switch was "far broader" than the mere failure to abide by the interest rate stated in the first contract. The problem with this contention is that the amended complaint contains no specification of any other conduct, aside from the undisclosed finance charge implemented through use of the Notice of Pre-Approval form, that would independently violate the CPA. For example, as noted in the next section of this order, there would be nothing improper with Auto-Torium's actions in releasing the new vehicle to the customer and taking possession of the trade-in before it obtained final financing approval as long as both Auto-Torium and its customer were free to cancel the contract in its entirety if the finance charge originally offered could not be obtained. This would be true regardless of any "emotional attachment" to the new vehicle that might cause the buyer to agree to pay a higher finance charge. Of course, the result might be different if Auto-Torium knew at the time it offered the initial finance charge that the buyer would not be able to qualify for that rate of interest, but there are no allegations to this effect in the amended complaint.

unenforceable under RSA 361-A, and therefore that Auto-Torium breached the only valid terms of the first contract when it required plaintiffs to pay a higher interest rate and finance charge than that originally specified. Auto-Torium seeks to dismiss this count based on the argument that the Notice of Pre-Approval form did not require plaintiffs to sign the second contract with its higher interest rate and finance charge. Rather, relying on the first paragraph of the form, Auto-Torium contends that where, as in this case, the originally offered financing terms were not available, both the seller and the buyers were free to cancel the contract entirely or to negotiate a new transaction. Citing Janikowski v. Lynch Ford, Inc., 210 F. 3d 765 (7th Cir. 2000) in support of its position, Auto-Torium asserts that merely because plaintiffs voluntarily chose the latter option does not give rise to a breach of contract.

Auto-Torium's reliance on Janikowski is misplaced because the contract at issue in that case truly did allow both the buyer and the seller to cancel the contract if the initially disclosed interest rate could not be obtained. The contract between Auto-Torium and plaintiffs contains no similar provision. The Notice of Pre-Approval form which Auto-Torium relies on as conferring a mutual right of cancellation is so badly drafted that it is hard to imagine anyone from the company actually read the form before it was put into use in defendant's business. The form is replete with grammatical errors, missing punctuation and/or run-on sentences, the effect of which is to make it exceedingly difficult to decipher. Despite these shortcomings, I conclude that the most sensible construction of the form, when read as a whole, is that it permits a buyer to cancel the contract only if Auto-Torium is totally unable to obtain financing for the buyer

at any interest rate. Where no financing at all is available, the first paragraph of the form does appear to allow the buyer to rescind the contract. On the other hand, if Auto-Torium is able to obtain financing somewhere – even at a higher interest rate – then the third paragraph of the form seems to require the buyer to return to Auto-Torium to execute whatever additional documents, including a new installment contract at a higher interest rate, may be necessary to complete the transaction. Given the terms of the pre-approval form, as well as plaintiffs' allegation that they believed they were required to execute the second contract, plaintiffs have stated a valid claim for breach of contract.

V.

In counts IV and V of the amended complaint, plaintiffs seek to hold defendant WFS liable for the allegedly unlawful conduct engaged in by Auto-Torium as described above. Plaintiffs assert that WFS's liability flows from the provision, contained in both the first and second contract as required by the FTC "Holder Rule," which states that any holder of the retail installment sales contract "is subject to all claims and defenses which the debtor [plaintiffs] could assert against the seller [Auto-Torium] . . . ."

WFS moves to dismiss counts IV and V on the grounds that plaintiffs' real complaint with respect to the entire transaction stems from Auto-Torium's failure to honor the terms of the first contract. But since it only became an assignee of the second contract, WFS argues that there is no basis for holding it liable for any improprieties with respect to the first contract. This argument ignores the fact that, through the mechanism of the Notice of Pre-Approval form, the first and second

contracts became inextricably intertwined. The essence of plaintiffs' complaint is that both contracts are invalid, the first because it required that plaintiffs obligate themselves to pay an undisclosed interest rate that would only be determined at some point in the future, and the second because it implemented the improper terms of the first contract by requiring plaintiffs to pay a higher finance charge than that which had originally been disclosed. Because, under plaintiffs' theory, the second contract is invalid, plaintiffs claim that RSA 361-A:11 relieves them of any liability to pay the finance charges imposed by that contract. Under the assignment clause of the contract, this is a "claim" which plaintiffs are entitled to pursue against WFS as the holder of the contract.

VI.

For the reasons stated above, Auto-Torium's motion to dismiss is granted with respect to count II of the amended complaint but denied with respect to counts I and III. WFS's motion to dismiss counts IV and V of the amended complaint is denied.

BY THE COURT:

December 3, 2002

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ROBERT J. LYNN
Associate Justice